

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3  
4 LORI WAKEFIELD, )  
 )  
5 Plaintiff, ) 3:15-cv-01857-SI  
 )  
6 vs. ) April 8, 2019  
 )  
7 VISALUS, INC., ) Portland, Oregon  
 )  
8 Defendant. )

9  
10  
11 (Pretrial Conference Hearing)

12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE MICHAEL H. SIMON

14 UNITED STATES DISTRICT COURT JUDGE  
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Pretrial conference proceedings

4

1 (April 8, 2019)

2 P R O C E E D I N G S

3 (Open court:)

4 THE COURT: Good morning. I was completing my review  
5 of defendant's objections to plaintiff's designations. That's  
6 why it took a little bit longer.

7 Please, be seated. Relax, please.

8 All right. One moment.

9 Let me share with you what's on my agenda and see if  
10 you have any comments on that. Then we will also talk about  
11 anything else that you all want to talk about.

12 One moment. All right. I do note that I did receive  
13 from Defendant's Exhibit 214 and 215, which were formerly  
14 Plaintiff's Exhibits 23 and 29 respectively.

15 So I'll allow those to be marked as defendant's  
16 exhibits. Then I've also received and read defendant's  
17 objections to plaintiff's designations. So we should talk  
18 about how we are going to handle the reading of the various  
19 deposition designations. We should talk about whether you all  
20 have any suggested amendments or edits, corrections, or  
21 objections to my voir dire script, to my preliminary jury  
22 instructions, to the final jury instructions that will be  
23 delivered at the close of the case, but before your closing  
24 argument, and to the special verdict form that I have prepared.

25 We had a little bit of discussion by email over the

1 weekend about that. So we can talk about that further. So  
2 that's my agenda. Then anything else that anyone wishes to add  
3 to that agenda, you're welcome to do so.

4 Let's begin with the reading of the deposition  
5 designations. By the way, let me ask this question: Does  
6 Justin Call still work for the defendant?

7 MR. O'NEAL: He does not, Your Honor.

8 THE COURT: Does Scott Gidley still work for  
9 defendant?

10 MR. O'NEAL: He does, Your Honor.

11 THE COURT: And does John Laun still work for  
12 defendant?

13 MR. O'NEAL: He does not.

14 THE COURT: Okay.

15 All right. So there were some question -- am I  
16 correct -- I'm going to ask plaintiff. These are not  
17 videotaped, correct?

18 MR. DOVEL: Your Honor, this is Greg Dovel. That is  
19 correct.

20 THE COURT: So I think the best way to present the  
21 excerpts from depositions to the jury in a way that the jury  
22 will be able to follow is as follows: This is my thinking, but  
23 you can tell me if you have any different approaches or other  
24 objections.

25 For any given witness, and -- we will just take

1 Justin Call first. Whenever plaintiff wants to, if you will,  
2 call Justin Call in lieu of live testimony, but through  
3 deposition, I'll explain to the jury what we are going to see  
4 next. I'll explain to them what a deposition is, consistent  
5 with our model instructions.

6 Then I'll tell them that the plaintiff is providing a  
7 reader who will essentially play the role of Justin Call. He  
8 will come up to the witness stand. We will swear the reader in  
9 to read the transcript accurately, and then I will invite one  
10 of plaintiff's counsels to be the questioner. The witness will  
11 read the answers.

12 I think it probably is best for the questioner to  
13 begin with basically a page and line number, so for Mr. Call,  
14 it will go something like this -- I guess we don't necessarily  
15 need to do that on the direct. As long as you worked out that  
16 we are just going to be reading of the entirety of the  
17 deposition except for what I've excluded, it would be a  
18 question and reading.

19 "Would you state your full name for the record."

20 The witness responds, "Justin Call."

21 Then you go to the next piece of yellow highlighting,  
22 or where I have concluded that blue is appropriate for  
23 cross-designation. That is, under the rule of completeness, it  
24 should be read at the same time. Then that questioner  
25 immediately will continue with the next item of blue that I

1 have allowed for cross-examination at the same time and the  
2 witness reads the answer. That will be plaintiff's direct  
3 examination of Justin Call.

4 Then where the defendant wants to bring out other  
5 information from Justin Call, then you can say, "I have no  
6 further questions." Then I'll tell the jury, even though  
7 Mr. Call is not here, under the equivalent or an analogy to  
8 cross-examination, I will then have the defendant read whatever  
9 questions the defendant wants to read. But that same reader  
10 who was reading Justin Call's role will now continue to read  
11 the answers. So the jury will understand this person is  
12 reading the answers that Justin Call gave.

13 The defendant may then inquire and ask the questions  
14 that it wants to that I was not allowing under rule of  
15 completeness, but will now allow the defendant to do under an  
16 analogy cross-examination.

17 And I'll tell you what, if Justin Call were here, and  
18 the plaintiff wanted to ask direct examination questions, and  
19 the defendant then wanted to go beyond the scope in  
20 cross-examination so that Mr. Call would not need to come back  
21 later in the trial, I normally would allow that. I would let  
22 that be done normally under a theory of efficiency, and I would  
23 make the defense then under those circumstances proceed with  
24 non-leading questions. But these aren't sufficiently  
25 suggestive questions that I'm going to worry about it.

1           So to be clear, plaintiff calls the witness, and will  
2 read the yellow portions. Don't skip over the blue portions  
3 that I have designated as appropriate cross-designation under  
4 the rule of completeness, and there is not that much.

5           Then whenever you tell me you have no further  
6 questions of Mr. Call, I'll then invite defense counsel to ask  
7 any of their blue-designated/cross-designated questions that  
8 they have, except where I have sustained an objection -- and  
9 there is not that much of that. Then you ask all the questions  
10 of Mr. Call that you want or the Mr. Call sit-in, the reader  
11 that you want, and then when we are done. We are done, and  
12 Mr. Call's testimony has now been fully presented to the jury.

13           It may be better for an appellate record -- well, let  
14 me ask you this: Would you be planning on reading it straight  
15 through so we don't need to have our court reporter take all of  
16 that down because it is all marked in your transcripts that  
17 have been filed? Or are you planning on breaking up portions  
18 of that reading with things such that we really do need live  
19 reporting?

20           MR. O'NEAL: Judge, I would rather do the latter. As  
21 I was talking -- I am concerned we are going to be realtime  
22 crunched in the trial, and so I think the latter is the better  
23 way to do it.

24           THE COURT: Normally our court reporter is a superb  
25 reporter, when a lawyer asks a question, the witness gives an



1 answer, and our reporter takes that all down. Just remember  
2 that as you are reading a question, read it slowly. If you are  
3 not reading it slow enough, either the reporter or myself will  
4 jump in and ask you to read more slowly. I think we can  
5 proceed that way as long as you read the questions slowly and  
6 the reader reads the answers sufficiently slowly.

7 Let me ask interrupt and ask our court reporter,  
8 Dennis, is that okay with you?

9 THE COURT REPORTER: Yes.

10 THE COURT: Anything from plaintiff on that issue?

11 MR. DOVEL: Just a couple of points of clarification,  
12 Your Honor.

13 There are a couple of additional clips designated in  
14 blue, for completeness, that we did not object to that we agree  
15 should be read for completeness. We will be adding those as  
16 well as the ones Your Honor has ruled on.

17 Second, Your Honor, for certain topics, particularly  
18 with Mr. Gidley, there are certain sections that are out of  
19 order in the transcript. We want to combine topics into a  
20 logical sequence. What we proposed to do is prepare an actual  
21 script of the questions and answers, provide it to opposing  
22 counsel, and see if they have an objection how we've organized,  
23 and proceed in that manner.

24 THE COURT: That's fine. Just make sure I get the  
25 script too. If there are any objections, let me know in

1 advance. But as you are doing this, you can't designate new  
2 things.

3 MR. DOVEL: Yes, Your Honor.

4 MR. O'NEAL: That's fine. If we could also ask that  
5 whatever it was that they are going to be adding in as  
6 completeness, I would like to know what those sections are as  
7 well.

8 THE COURT: Right. I think that's what I heard  
9 Mr. Dovel say. He is going to give a final script that will  
10 show exactly what he is planning on reading to the witness,  
11 what the witness will be answering, and that will include  
12 everything that you've designated and the order you want to  
13 proceed in. That also includes, when appropriate or when I've  
14 ordered it, as needed, in order to satisfy the rule of  
15 completeness, that's going to go in there too.

16 Then you can let the plaintiff's counsel know, if and  
17 when you can, what you're planning on doing in cross. And if  
18 you can do it in the same fashion, that will be terrific. If  
19 you can't, we will figure out some way to make it work.

20 MR. DOVEL: Your Honor, the final thing is, there  
21 will be a few exhibits that we will be displaying during the  
22 reading. I would propose that just for the record that if I'm  
23 reading it, for example, I would say, "We are now displaying or  
24 publishing Exhibit 45, page 1," just so the record is clear on  
25 what's being shown to the jury.

1 THE COURT: That's fine. I think at that time you  
2 will need to offer Exhibit 45, as I've indicated in my rulings.  
3 If I'm inclined to accept it, I will then receive it at that  
4 time. Then you can ask me to show it to the jury. I will say,  
5 "Yes." Then you can put it up on the jury's screen or however  
6 else you wish to display it, and then you can resume with the  
7 questions with Mr. Call about Exhibit 45.

8 Is that how you want to do it?

9 MR. DOVEL: Yes, Your Honor.

10 THE COURT: That will work.

11 MR. O'NEAL: And objections to the exhibits should be  
12 lodged at that time, Judge? I know you've reserved ruling on a  
13 few.

14 THE COURT: There are a few that I am going to want  
15 to hear some more talk about. There are a few that especially  
16 I'm going to want to hear some foundation about. But where  
17 I've said in my tentative ruling that I anticipate accepting  
18 it, you're welcome to say, "No further objections," and all of  
19 your previous objections are preserved. If you want to say you  
20 still object, I will ask, "Is there anything additional you  
21 want to be heard about?" If you say, "Yes," I'll let you be  
22 heard. If you say, "No," my anticipation is I'll overrule the  
23 objection and receive the exhibit.

24 MR. O'NEAL: Understood.

25 THE COURT: But it is fine if you simply want to

1 treat all previous objections that have already been ruled on  
2 in the pretrial order, or will be when I finalize it today,  
3 those are all preserved as far as I'm concerned.

4 MR. O'NEAL: Thank you, Judge.

5 THE COURT: All right. So that's how we will do the  
6 depositions.

7 One further thing, Mr. Dovel. I would appreciate it,  
8 once you've figured out how much and in what order you are  
9 going to be asking these deposition questions to folks, I would  
10 like a time estimate. I'm not going to hold you to it, but I  
11 would like a general sense so I can give the jury breaks, as  
12 appropriate, plan the trial days, as appropriate. But I would  
13 like your best sense or estimate as to now that you're going to  
14 give me all of Justin Call's testimony that will be read,  
15 including the portions that must be included for completeness,  
16 how long do you anticipate that will last.

17 MR. DOVEL: Yes, Your Honor.

18 THE COURT: Okay. I think that's all we need to talk  
19 about deposition testimony, unless anybody else has any other  
20 issues on deposition testimony.

21 Seeing none, okay.

22 Should we turn next to my voir dire script?

23 As you can see, I do most of the questioning of the  
24 jury. It is my practice to be very thorough and try to fairly  
25 and evenhandedly find out, not only relevant background

1 information about the jurors, but also to explore their  
2 opinions, their attitudes on certain key issues relating to  
3 this case.

4           Then when I am done, I will invite counsel, first  
5 plaintiff's counsel and then defense counsel, one attorney from  
6 each side, to do appropriate voir dire. You won't be limited  
7 to just following up on any answers. You can ask your own  
8 questions, if you wish. I can't recall whether we discussed  
9 this last week, so at the risk of being redundant, the one  
10 thing I don't allow counsel to do is use voir dire as a  
11 mini-opening statement. You'll have an opportunity soon enough  
12 to do your opening statement. But don't use this to basically  
13 tell them what the case is about and what the evidence will  
14 likely show.

15           You're welcome to ask about their experiences in  
16 life, their attitudes, their opinions. You will hear me asking  
17 them to make certain commitments to me about not doing  
18 independent research, keeping an open mind and the like, but  
19 you can't ask them to make commitments to you. You can't ask  
20 them if they find the facts that you have proven such and such,  
21 will they vote in favor of the plaintiff. Or if plaintiff  
22 doesn't prove thus and such, will they vote in favor of the  
23 defendant. That, I don't think is proper for voir dire.

24           Any comments that anyone wants to make on my  
25 voir dire script?

1 MR. DOVEL: Your Honor, this is Greg Dovel for the  
2 plaintiff. We have no objection to the Court's voir dire  
3 script.

4 MR. O'NEAL: No objections; one addition, Judge.  
5 Item No. 6, Blake Mallen.

6 THE COURT: All right. Do I have a statement of what  
7 Mr. Mallen will be testifying about? I did not see it in the  
8 defendant's witness statement.

9 MR. O'NEAL: You do not, Judge. That's the witness  
10 that we talked about at the last pretrial conference. I sent  
11 it to the plaintiffs over the weekend. I am happy to send it  
12 to you as well.

13 THE COURT: Remind me what Mr. Mallen is going to  
14 talk about.

15 MR. O'NEAL: Mr. Mallen is the president/cofounder of  
16 ViSalus, former CEO. In sum, he is going to be talking about  
17 the other call campaigns associated with ViSalus; that it was  
18 not just limited to Voice Casting and Press One. There is more  
19 to it, Judge, but that's getting to the point.

20 THE COURT: Please do file a supplemental witness  
21 list with a summary of his testimony. I will add Blake Mallen  
22 to the list for the jury -- if they know him.

23 What city does he live in?

24 MR. FOSTER: Los Angeles, I believe, Your Honor.  
25 Los Angeles.

1 THE COURT: Okay. Let me explain how I do the jury  
2 selection process. If a juror in responding to me is just  
3 obviously inappropriate for this trial, whether it be for  
4 hardship reasons, can't be with us for more than a day, or  
5 knows one of the witnesses or lawyers or somebody else, or  
6 convinces me that they would otherwise be challengeable for  
7 cause, what I generally do, I just excuse them on my own. We  
8 will then call up someone else, the next person in the line,  
9 and you'll have a full list of all of the probably 30 folks or  
10 so.

11 We will then call the next person up, and that person  
12 fills the seat of the person that I've just excused. Let's  
13 suppose we call up the first 14 folks. Juror No. 2 can't be  
14 with us if it is more than a one-day trial. I'm satisfied with  
15 her explanation. I excuse them. Then juror No. 15 is called  
16 up and sits in seat No. 2, and that becomes our new juror  
17 No. 2. I will say to that juror, "Can you be with us for the  
18 duration of this trial?" If they said, "Yes," we move on. If  
19 they say, "No," then No. 16 will take seat No. 2. That's how  
20 it will work.

21 Eventually we will get to a situation where we will  
22 have 14 folks in the jury box that I'm not going to excuse for  
23 hardship. I've not heard anything that prompts me to want to  
24 excuse them for cause, although you may still have that  
25 opportunity to make that argument out of the presence of the

1 jury.

2 I then turn it over to plaintiff's attorney to  
3 question for about 15 minutes, if you wish; defense attorney to  
4 question for about 15 minutes. I'll then ask counsel to see me  
5 over at sidebar. And I will ask, "Do you have any challenges  
6 for cause?" If you do, and if I grant them, we will then  
7 excuse those folks, bring up the new people from the back of  
8 the room, continue with our questions for those folks until  
9 eventually we get to the stage where you tell me you have no  
10 challenge for cause or I tell you I'm overruling your challenge  
11 for cause.

12 By the way, none of that is going to be on the  
13 record. So I will give you the opportunity later, out of the  
14 presence of the prospective jurors, to put your arguments on  
15 the record that you argue that juror No. 7 should be challenged  
16 for cause. You can say why. I will put on the record that I  
17 have rejected that, and you've made your record.

18 But eventually we will get to the stage where we have  
19 14 folks where they are clean for cause, either because you  
20 don't have any objections or I've overruled your objections.  
21 Then I'll send everybody in the hallway, and we will close the  
22 doors for you to exercise your peremptory strikes; three  
23 strikes per side.

24 In case we are running low numbers, in case we have  
25 people that for whatever reason aren't here, that 14 may turn



1 into 13. You will always be allowed your three strikes per  
2 side. If we end up with eight people on our juror, that's fine  
3 with me. All eight will deliberate to a unanimous verdict. We  
4 won't have any alternates in a civil trial. If, however, we  
5 are running out of folks, and we only have 13, you can still  
6 can exercise your three peremptories per side, and then we will  
7 have a jury of seven people.

8 An interesting question is what do we do if you  
9 choose not to exercise all of your peremptories? My  
10 inclination would be to let whoever is remaining be on the  
11 jury. So be it. They decide unanimously. Let me know if you  
12 have any objections to that process. I haven't seen it happen  
13 yet. But usually when you only have three per side, you'll  
14 find three people that you will want to bump off on  
15 peremptories. But let's talk about what to do if you don't.  
16 That is jury selection.

17 Any questions?

18 Yes.

19 MR. O'NEAL: Judge, with the strike-and-replacement  
20 method, which I think we are using, in a hypothetical where a  
21 prospective juror is removed in the middle of your voir dire,  
22 how do you address what that new juror's answers might have  
23 been to all of the previous questions?

24 THE COURT: Efficiently. I will start by saying, "Is  
25 there anything in particular that you would have raised your

1 hand on before?" Then I will go back and ask most of the  
2 questions again for that juror. Since I'll just be talking  
3 with one person, I will do it relatively expedited, but I will  
4 try to cover all of the important points with that juror. To  
5 the extent I've left something out, you can either ask me to  
6 cover something, or you can cover it in your examination.

7 MR. O'NEAL: Okay.

8 THE COURT: All right. Any questions about voir  
9 dire?

10 All right. I think we talked about our scheduling.  
11 We will start at 9:00 a.m. on Wednesday of this week. We will  
12 pick a jury before we end the day on Wednesday. I am  
13 moderately hopeful that we will pick our jury with enough time  
14 left over. I really need to leave by one o'clock. I am  
15 moderately hopeful that we will be able to pick our jury and  
16 actually have me read them preliminary jury instructions before  
17 we end for the day. That way we can start up Thursday morning  
18 first thing with opening statements.

19 So let's turn next to preliminary jury instructions,  
20 and then I'll ask some questions about opening statements in a  
21 few more moments.

22 Any comments, issues, suggestions on my draft  
23 preliminary jury instructions, which I sent to you all by  
24 email?

25 MR. JACOBSON: Plaintiffs have one comment and

1 suggestion, Your Honor. Your Honor is going to instruct the  
2 jury that ViSalus does not contend that it had express written  
3 consent. But as the instructions stand now, both final and  
4 preliminary, there is no definition of "express written  
5 consent." We don't think we need the whole full-blown  
6 definition that we originally proposed, but we would ask  
7 Your Honor to provide one sentence. I can show Your Honor  
8 where we would suggest inserting that in a slide.

9 THE COURT: Sure.

10 MR. JACOBSON: Your Honor, here are your current  
11 tentative preliminary and final jury instructions on express  
12 written consent. Here is the full-blown definition of "prior  
13 express written consent" that we proposed. We would ask  
14 Your Honor to include just this one sentence that I  
15 highlighted.

16 THE COURT: Let me write it down, and then I'll hear  
17 from the defendant.

18 MR. O'NEAL: So if I'm understanding correctly, what  
19 the plaintiff is proposing is on the first paragraph on page 4,  
20 last sentence, the clause, "Without having prior express  
21 consent of the called party," that the plaintiff is proposing  
22 to replace that clause with --

23 THE COURT: What I just said is, "Can I write this  
24 down and then hear from defendant?"

25 MR. O'NEAL: I apologize.

1           THE COURT: Let me write it down, and then I'll be  
2 able to focus on what you are saying.

3           MR. O'NEAL: I apologize, Judge.

4           THE COURT: All right. I've written down the  
5 sentence.

6           Mr. O'Neal, you were saying, from the top, please.

7           MR. O'NEAL: My apologies, Judge.

8           Maybe I should ask counsel again. Is the highlighted  
9 portion going to be added on, or is it replacing something?

10          MR. JACOBSON: Added on.

11          THE COURT: Where does plaintiff's counsel want it  
12 added to? First, on the preliminary instructions.

13          MR. JACOBSON: Your Honor, let me read this sentence  
14 for the record. The sentence we would like the Court to add  
15 says, "'Prior express written consent' means a signed, written  
16 agreement that clearly authorizes the caller to place  
17 telemarketing calls using an artificial or prerecorded voice."

18          Where we would suggest adding that is shown here,  
19 Your Honor. Your Honor's instructions first have a sentence  
20 explaining what the TCPA prohibits. That sentence ends by  
21 saying --

22          THE COURT: One second. What page is that?

23          MR. JACOBSON: On your proposed preliminary  
24 instructions, Your Honor, this is on page 8.

25          THE COURT: One moment. Okay.

1 MR. JACOBSON: We would propose inserting the  
2 sentence we proposed after the sentence that ends "without the  
3 prior express consent of the party being called." Then insert  
4 the sentence we proposed, and then the instruction continues on  
5 as in Your Honor's tentative.

6 THE COURT: One moment.

7 Okay. Then on the final you want it inserted in  
8 Instruction No. 21?

9 MR. JACOBSON: Yes, Your Honor.

10 THE COURT: One moment.

11 MR. JACOBSON: Page 15.

12 THE COURT: All right. I understand what you are  
13 asking for. First of all, does the defendant have any further  
14 questions about what plaintiff is proposing?

15 If not, defendant's position.

16 MR. O'NEAL: No further questions.

17 THE COURT: Any objection?

18 MR. O'NEAL: Yes, Judge. When I was going through  
19 the instructions and also thinking about the case following our  
20 last conference, two issues came up to me. One, when I was  
21 reading the instructions, given that defendant is not asserting  
22 written consent which complies with the TCPA as an affirmative  
23 defense, it struck me that we probably shouldn't be talking  
24 about consent at all in any of the instructions.

25 So I don't know if you want to get into this in

1 depth. I was actually going to address it more for purposes of  
2 final instructions instead of preliminary.

3 THE COURT: Now is fine.

4 MR. O'NEAL: Your druthers, Judge.

5 So my thought is that what we should do is strike  
6 references to consent, both in the instruction "prior express  
7 consent not at issue," or perhaps a more modified instruction,  
8 which gets to a more substantive issue.

9 I'm concerned that if we don't give some context to  
10 the jury or provide them some part of the story as to why my  
11 client was calling existing or former promoters who were their  
12 sales agents or former or existing customers, that the jury is  
13 going to make a mistake or assume that this was a random cold  
14 calling campaign to a bunch of people it didn't have any  
15 connection with.

16 My concern candidly got highlighted, Judge. There  
17 was a podcast that came up where someone was talking about that  
18 very issue and said that they had a run-amuck jury and think;  
19 that jurors hate mass calling campaigns, et cetera, et cetera.  
20 And that's when it really crystalized for me. I'm like, "Okay,  
21 that's really a danger for purposes of prejudice."

22 So that has led me to this. What I would like to do,  
23 and I haven't penciled it out. But I would like to put a  
24 little bit more focus on the concept of consent, which is  
25 something like, "ViSalus is not contending that it had consents

1 which meet the requirement of the TCPA," or something like  
2 that.

3 But I do think that we should be able to tell the  
4 jury as part of the story, "Hey, we did have a prior  
5 relationship with these people of some sort."

6 THE COURT: Sure.

7 MR. O'NEAL: "And that's the reason why we are  
8 calling them."

9 THE COURT: I have no problem with you telling the  
10 jury of a prior relationship. So which witness is going to do  
11 that? Is that going to be Mr. Mallen?

12 MR. O'NEAL: I believe so, Judge, although I believe  
13 there is some designated deposition testimony both from Call  
14 and Gidley on the point as well.

15 THE COURT: I think in terms of what the plaintiff is  
16 requesting here, in terms of what is "prior express consent," I  
17 don't see a problem with what they are proposing.

18 Is it legally incorrect?

19 MR. O'NEAL: I think it would be better to say that  
20 it is incomplete from a legal definition. It certainly  
21 captures the essence, but there are some other pieces that the  
22 statute contends.

23 THE COURT: So what should be added in order to not  
24 mislead our jury?

25 MR. O'NEAL: You know, looking at it, Judge, I think

1 if we added the other stuff, it would cause them to be confused  
2 even more. It is like "which has the following language." So  
3 I think to add the full technical definition probably would be  
4 more problematic.

5 So if I could say this: Right now, Judge, looking at  
6 it, I hear what you are saying, and it may not be a problem.  
7 If I could reserve the possibility to provide some later  
8 comment to it.

9 THE COURT: Absolutely. Also, what I would suggest,  
10 if you have some good constructive suggestions, run them by  
11 plaintiff first. If plaintiff agrees, I'm not going to stand  
12 in the way in terms of what both sides agree upon in terms of  
13 this type of instruction. If you have some additional  
14 language, run it by the plaintiff. But otherwise, the concept  
15 sounds fine to me. The concept of you making sure that the  
16 jury understands the right context is perfectly fine with me.  
17 If it is already in some of the designated deposition  
18 testimony, fine. If you add it to your witness statement for  
19 Mr. Mallen, fine.

20 Okay. Anything else on final instructions? Anything  
21 more on preliminary?

22 MR. JACOBSON: Nothing from the plaintiff,  
23 Your Honor.

24 MR. O'NEAL: Nothing from the defendant, Your Honor.

25 THE COURT: Anything more on final?



1 MR. JACOBSON: No, Your Honor.

2 MR. FOSTER: From the defendant, yes, Your Honor.

3 THE COURT: Okay. Go for it.

4 MR. FOSTER: Instruction 17, the class TCPA claim, I  
5 think that instruction is generally fine. My concern when I  
6 read this a few times, from the perspective of a juror, there  
7 is a potential that I think they may be confused reading these  
8 elements that they are not necessarily linked for the violative  
9 calls.

10 For example, if the plaintiff were to prove that some  
11 of the calls were telemarketing messages while another bucket  
12 of calls had a prerecorded voice and a third bucket of calls  
13 were to mobile or landlines, they could confuse it and put them  
14 all together.

15 My suggested addition -- now, it is not grammatically  
16 perfect -- but in front of 2 and 3, I would just add: "And  
17 each of those calls" -- or calls -- so it directs the jurors to  
18 understand that if they found that there are a certain bucket  
19 of calls that are telemarketing calls, they must also have  
20 played a prerecorded voice. The same thing with 3. "Each of  
21 those calls were made to a cell phone or landline," just so the  
22 jury understands that each of the elements are linked, and they  
23 can only render a verdict in favor of class members whose calls  
24 meet every single one of those elements.

25 I'm not necessarily married to that language.

1 Candidly last night, Your Honor, I was trying to find a way  
2 that made sense, but that's essentially the concept of what we  
3 want and would like to see.

4 THE COURT: Well, since No. 1 uses "calls" in the  
5 plural, I think I can strike "the call" and go with plural in 2  
6 and 3.

7 Would the following serve this purpose: Begin 2 with  
8 "those calls used"; and 3 would be "those calls"?

9 MR. O'NEAL: Yes, Judge.

10 MR. FOSTER: Yes, Judge. I believe that would be  
11 fine.

12 THE COURT: So I would strike "the call or" and  
13 replace it with "those" in both two and three.

14 Any objection to that from plaintiff?

15 MR. FRANZINI: No, Your Honor.

16 THE COURT: I think it is a good change. Anything  
17 else in final jury instructions from defendant?

18 MR. O'NEAL: One comment, Judge. Instruction No. 18  
19 regarding residential telephone landline defined. It is on  
20 page 14, first paragraph, second line, the clause that says,  
21 "It must be one or the other."

22 THE COURT: Uh-huh.

23 MR. O'NEAL: Judge, I don't think that's quite  
24 accurate. It could be both. You could have a residential  
25 line, which the plaintiff held out and used as a business line.

1 It could be registered residential, or she could use it as  
2 both. She could take calls from her mother, which I think she  
3 got lots of, but she could also take telephone calls from  
4 people who had children in her daycare. My suggestion on that,  
5 Judge, that sentence should be stricken.

6 THE COURT: What that would really mean is if they  
7 find it is a residential line, then defendants are going to  
8 have some problems on that call.

9 MR. O'NEAL: Yes.

10 THE COURT: All right. Any objection from plaintiff  
11 on that?

12 MR. FRANZINI: Your Honor, I think it is right that  
13 it has to be one or the other. Unless the defendants can show  
14 that it is used primarily as a business line, then it's a  
15 residential line. Therefore, it is covered by the TCPA. I  
16 think Your Honor's sentence is accurate and should stand.

17 THE COURT: I want to make sure they understand what  
18 is a residential telephone line.

19 So the next paragraph is really the key for that. In  
20 deciding this issue -- maybe if I strike that sentence, "It  
21 must be one or the other," and I'll begin the next paragraph:  
22 "In deciding whether a landline telephone is residential or  
23 business, you must give the word 'residential' its usual and  
24 ordinary meaning. You may consider whether Ms. Wakefield's  
25 telephone number was registered as a residential or a business

1 number. You also may consider whether that number was  
2 publicized or held out to the general public as a business  
3 telephone number, even if it was registered as a residential  
4 telephone number. The fact that a landline telephone is used  
5 for some business calls does not necessarily make it a business  
6 telephone landline." I think I will put a period after that  
7 and revise the last sentence to read, "The key point is that a  
8 residential landline is used primarily as a residential  
9 telephone."

10 Will that work for plaintiff?

11 MR. FRANZINI: Yes, Your Honor.

12 THE COURT: Any objection to that from defendant? I  
13 will be taking out "it must be one or the other," but I'll be  
14 modifying it as I've just described.

15 Is that okay for defendant?

16 MR. O'NEAL: Reserving the prior objections that we  
17 submitted, yes, for purposes of today.

18 THE COURT: All right. I will make those revisions.

19 All right. On the special verdict form, I received  
20 an email -- one moment. I received an email from plaintiff's  
21 counsel, Mr. Franzini, over the weekend. I responded. As of  
22 right now, neither the email nor the response is in the  
23 electronic docket for appellate purposes. If either side wants  
24 to file it in the ECF docket for appellate purposes, go ahead.  
25 File your question to me; file my response. But as of right

1 now, the appellate courts have no idea what we are talking  
2 about.

3 So does anybody want to be heard further on it?

4 MR. FRANZINI: Yes, Your Honor.

5 THE COURT: Go ahead.

6 MR. FRANZINI: So as Your Honor recognized in the  
7 jury instructions and your response to my email, to prove a  
8 violation of the TCPA, it is not necessary to prove whether a  
9 call is to a residential as opposed to a mobile telephone  
10 number. If we show it is one or the other, that's sufficient.

11 The evidence that we're going to present at trial to  
12 the jury is going to consist of a -- we are going to say,  
13 "These numbers." This group of collective telephone numbers  
14 are either mobile or residential, but we don't have it divided  
15 up, "Here are the mobile ones; here are the residential ones."  
16 So my concern is that if we put forward that evidence and the  
17 jury believes it and concludes that we have shown all the  
18 numbers are residential or mobile, then that should be a  
19 finding in favor of the plaintiff. It should be a finding,  
20 assuming that the other requirements are met, ViSalus violated  
21 the TCPA.

22 But when they turn to Your Honor's proposed verdict  
23 form, they will see a question that says, "How many calls did  
24 plaintiff prove were to mobile telephone numbers?" They may be  
25 able to come up with a number based on common sense or other

1 things. But because we haven't divided up those numbers into  
2 one or the other, my concern is that the jury is going to say  
3 zero, because you haven't shown us it is mobile as opposed to  
4 residential. Then they get to the next question that asks how  
5 many calls were residential, and then they will look at it  
6 again and say zero, because it is not -- you haven't shown  
7 which it is, residential or mobile. So the result of that is  
8 we will have to put forward persuasive evidence, but we get a  
9 defense verdict because we haven't made a distinction. So  
10 that's the primary objection to the current form.

11 THE COURT: Thank you, Mr. Franzini.

12 Defendant's position.

13 MR. FOSTER: Your Honor, I think your verdict form  
14 got it exactly right, and I'll explain why. First, I think it  
15 is an affirmative element that both of the claims need to show  
16 that it is a residential landline or the landline section and  
17 for the cell phone portion.

18 I think in this case, especially, given the nature of  
19 the company, this is a multilevel marketing company, the  
20 landline portion is going to be subject to -- at least in part  
21 these were promoters. These were people that were running, to  
22 a certain extent, home-based businesses. I expect the evidence  
23 will show these were promoters who were running businesses, and  
24 I would expect to make the argument that some of these  
25 landlines are business lines.

1 I don't think there is any way for the jury to assess  
2 that out, and I think that's a real problem for the plaintiff.  
3 I think candidly, Your Honor, as you noted in your email, you  
4 noted that this is something commonly done in TCPA class  
5 actions. It is something that's very easy to do. In the Dish  
6 Network case and a whole host of other class action cases,  
7 plaintiffs' counsel, either in the class certification stage or  
8 before trial, will designate an expert. That expert will take  
9 the purported call list, and they will go through Lexis. They  
10 will go through Experian. They will do script tracing. They  
11 will do a whole host of analysis to say, "Here are cell phones.  
12 Here are landlines." And even further, "Here are landlines  
13 that are attached to the basis," and then you can make that  
14 presentation to the jury and meet that burden.

15 That wasn't done in this case, and I think it should  
16 have been done. I think given that we will be presenting  
17 affirmative defenses specifically going to the residential  
18 landline, that lumping them all together would be highly  
19 improper. Especially as Your Honor noted, for purposes of  
20 appeal, I think that's an issue that needs to be broken out so  
21 to make a clear appellate record. I suspect if either side  
22 loses on that issue, that will be something taken up with the  
23 Ninth Circuit.

24 THE COURT: Plaintiff's response.

25 MR. FRANZINI: Your Honor, one thing we theoretically

1 could have done is divided up mobile/residential. If we had  
2 done that, that would have insulated the mobile numbers from  
3 this particular affirmative defense. That's not the way that  
4 we decided to meet our burden. The result of that will be that  
5 they're going to be able to make this argument to the jury and  
6 say, "Hey, you know, this affirmative defense applies not just  
7 to your residential calls, but it infects your mobile calls  
8 potentially," they could say that.

9 But that doesn't mean -- because we don't have to  
10 prove which it is, if a verdict form is entered that would  
11 require us to make this distinction, that's now part of our  
12 burden of proof, then that would be an error greater than --  
13 that would be error.

14 THE COURT: Well, how is the jury going to know --  
15 I'm just following up on what Mr. Foster's argument is. How is  
16 the jury going to know, for any telephone line that may be  
17 listed -- by someone who received a call/has a home  
18 telephone -- how are they going to know whether or not that  
19 call or that line satisfies the definition of residential  
20 landline as I instruct the jury?

21 MR. FRANZINI: Yes, Your Honor. The answer to that  
22 is the same way that the jury makes that determination for  
23 other cases where the mobile lines are split up from the  
24 residential lines. So if you have, for example, in the -- the  
25 evidence we have here, we have evidence that ViSalus collected



1 numbers that were specifically either home numbers or mobile  
2 numbers.

3           Then they also collected information that allowed you  
4 to say, "This number is associated with a business." So we  
5 were able to subtract out the numbers that are associated with  
6 a business. What's left are numbers that are home numbers or  
7 mobile numbers.

8           So the answer to Your Honor's question is the same  
9 way it is always done in TCPA cases for the residential  
10 numbers, which is if we put forward evidence that the number is  
11 residential, which we have, then the defendant can raise an  
12 affirmative defense to that or can challenge the sufficiency of  
13 that evidence, but it is ultimately for the jury to decide is  
14 the evidence we put in sufficient on that issue or not.

15           I can walk through the evidence more, if Your Honor  
16 wants. This is a question for the jury. It should go to the  
17 jury whether -- our evidence of residential is enough -- and I  
18 think the fact that we didn't separate out the mobile ones  
19 really has nothing to do with that issue because that issue  
20 still exists with respect to the residential lines.

21           THE COURT: Any response from defendant?

22           MR. O'NEAL: Judge, do you mind if I jump in?

23           THE COURT: That's fine. By the way, let me tell you  
24 this, now that you raise this issue. When you're talking with  
25 me, I don't care how many people from any given side jumps in,

1 as long as only one person speaks at a time. However, when  
2 questioning a witness, especially a live witness in front of  
3 the jury, only one lawyer per side does the questions, and the  
4 person who does the questions is the only one who can do the  
5 objecting.

6 So let's suppose that Mr. Dovel is questioning a  
7 witness for the plaintiff on direct, and Mr. O'Neal stands up  
8 and makes an objection. Whether I sustain or overrule the  
9 objection, Mr. O'Neal is now doing the cross, even if you all  
10 were planning that Mr. Foster was doing the cross.

11 Understood?

12 MR. O'NEAL: Yes, Judge.

13 THE COURT: And it works in both directions.

14 MR. DOVEL: Yes, Your Honor.

15 MR. O'NEAL: So let me back up and say what the  
16 evidence is and then we can grapple with the problem.

17 No. 1, to be clear, the part about violating the TCPA  
18 with respect to mobile, is a different statutory section than  
19 the section which is violating for residential. Also,  
20 residential is the only section which has the business  
21 exception, where the business doesn't apply to mobile.

22 The plaintiffs, as counsel pointed out, did not do  
23 any attempt to divide up those buckets. Further, Judge, they  
24 didn't do any meaningful attempt to define what was or wasn't a  
25 business number. Not only that, but I don't think, and this is

1 part of what we set forth, or at least we're hinting as part of  
2 our filings. I don't think they are going to make the burden  
3 of proof in their opening case to show that the numbers dialed  
4 were either mobile or residential. They have got to go from  
5 they collected them; this is was what the quantity of the  
6 numbers were, this is what went into it; them those same  
7 numbers were used and those numbers were dialed. And I don't  
8 think they are going to be able to mark all the way across.

9 Be that as it may, the concept that somehow they  
10 still don't have to get the jury to divide them up is wrong,  
11 because they do. If you don't divide them up, then we are not  
12 going to ever know or have the ability to talk about, "Well,  
13 this was mobile, and it wasn't the subject of the defense," and  
14 we are not going to be able to determine the residential. How  
15 many of them were determined to be business?

16 And I should comment, the issue about the business,  
17 Judge, there has been no objective analysis or expert opinion  
18 about what was or isn't a business. As I understand it, like  
19 literally in like the last 24 hours, they have gone back into  
20 their summary spreadsheets that they used and discovered  
21 something that we knew was there, and we were going to be  
22 pointing out to you, which is they've included in that summary  
23 a number of persons that will have names like Taekwondo Bob,  
24 LLC, or something like that.

25 Now, after the fact, they are like, "Oh, crud, well,

1 we know for sure that's there, but we don't know however many  
2 more might be." It just highlights the problem, Judge. If we  
3 don't divvy them up like you suggested, this is going to be one  
4 wicked mess. I think you got it right, and I think the verdict  
5 form should stay as it is.

6 THE COURT: Am I correct in my assumption that it  
7 really is not that difficult to take a look at any given  
8 telephone number, 10-digit telephone number, and identify which  
9 ones of these are mobile and which is not a mobile?

10 MR. O'NEAL: Judge, based on my reading of the cases,  
11 it is not hard at all. Not only that, but it is one of those  
12 things that is objectively verifiable. You can go to  
13 independent evidence that doesn't fall into that gray area of,  
14 "I'm a psychologist, and let me know whether I can give my  
15 opinion."

16 THE COURT: There are a number of databases, whether  
17 it be LexisNexis, Spokeo, or I think even Google will tell you  
18 whether or not a given ten-digit number is or is not mobile.  
19 It won't tell you whether it is residential or business. But  
20 if it is mobile, it will tell you it is mobile.

21 MR. O'NEAL: Absolutely, Judge.

22 THE COURT: Any response from plaintiff as to what  
23 Mr. O'Neal just said?

24 MR. DOVEL: Your Honor, if I could jump in here. If  
25 Your Honor is willing to allow us leave to gather up that

1 evidence and put it in, we are willing to put the mobile  
2 evidence in. It won't change where we're at. The reason is,  
3 Your Honor, fundamentally, the numbers were gathered up by  
4 ViSalus from applications that said home or mobile. They put  
5 them all into a database. They confounded them. They never  
6 produced to us information that identified which of these had  
7 been collected as home and which was mobile. They didn't make  
8 that available to us.

9           As a result, we proceeded with, well, we don't need  
10 to know that. All we need to know is it's one or the other.  
11 The jury can tell us how many of those there are. As for their  
12 defense, if they were right about their defense, it would  
13 infect their evidence. It would be good for them. It would  
14 spill over to everything. But the reason their defense is not  
15 going to work, Your Honor, the calls that they are making  
16 primarily are to win back customers. These are former  
17 customers, not actual customers.

18           And as Your Honor's instruction makes clear, the fact  
19 that somebody may have given their home number to a business  
20 relationship doesn't turn the home number into a business  
21 number. They have the burden of showing it was used primarily  
22 for business and not home. They will not be able to show that.

23           We have the inference that it is a home number; that  
24 there is no evidence that people used their home number for  
25 ViSalus business during the time they are making those calls,

1 and that meets our burden. So we will be able to meet our  
2 burden. They are not going to have evidence to rebut it.

3 But again, Your Honor, if we can see if we can gather  
4 that evidence in the next three days and have a witness, "Here  
5 is a list of how many mobile numbers there are." I don't think  
6 that advances the ball, Your Honor.

7 THE COURT: On that issue, if there is a motion to  
8 add a witness to a witness list, the other side will be  
9 entitled to tell me whether they object, whether they are  
10 prejudiced, and then I'll make an appropriate ruling.

11 But I'm thinking, as I'm hearing this through, it is  
12 going to be a complex question whether or not the evidence  
13 presented is sufficient. There is no need for me to decide  
14 that in advance. The best way to do that is to let both sides  
15 put in their evidence, make their argument, and then whichever  
16 way the jury goes, if the other side wants to make post-trial  
17 motions, make them.

18 But I think then the best way to frame this might be  
19 to give both sides what you want. Here is what I'm thinking,  
20 and I'll actually have to see if I can make this work. I'll  
21 work on it this afternoon. But I'm thinking I would do the  
22 verdict form at first the way the plaintiff wants, by asking  
23 how many calls were made to either a residential landline or a  
24 mobile phone. Fill in the blank. Then they will put in a  
25 number, presumably, if they are satisfied.

1           Then I would follow it up with -- this is a special  
2 verdict. I just want their answers to factual questions. Then  
3 we will figure out post-trial what the legal consequence of all  
4 of this would be. I would then say, "How many of those numbers  
5 are for residential business lines?" Either fill in a blank or  
6 check the box. "Don't know" or "can't tell." How many of  
7 those numbers are from mobile? Fill in the blank or check the  
8 box. "Can't tell."

9           We will see. Let's suppose the jury finds -- and I'm  
10 just making up these numbers for ease. Let's suppose the jury  
11 finds a total of four calls were made, and it checks the box  
12 one for residential -- and puts in four. "How many were for  
13 residential? One. How many for mobile? Three." All right.  
14 That will send us in one direction when we have our post-trial  
15 discussions.

16           Let's suppose they say how many were for residential,  
17 and the check a box "can't tell."

18           "How many were for mobile?" They put in at least  
19 two, but a total of four. All right. That will send us to  
20 another direction, and we will have some interesting post-trial  
21 discussions.

22           But that way, if the plaintiff is right, then all I  
23 need to do is ask what's the total of A or B, which, by the  
24 way, I'm skeptical that's the right way to do it. But if you  
25 are right, we will get the answer. If the Ninth Circuit says

1 you're right, and the Supreme Court says you are right, more  
2 power to you.

3 If, however, the jury answers the question the way  
4 that plaintiff wants, and then tell us that they either can't  
5 tell, they don't have enough information on how many were  
6 residential or how many were mobile, then defendant can make  
7 their arguments of what the legal implications, if any -- and  
8 there may not be. Plaintiff may be right.

9 But we will all be able to sort that out once we  
10 have, No. 1, all the evidence presented to the jury; and No. 2,  
11 the jury's factual determinations, including how many calls  
12 were made, which were mobile, which were residential, and can  
13 you tell how many were mobile? Can you tell how many were  
14 residential?

15 We will get their answers to all those questions and  
16 sort it out later. I think that's probably the better way to  
17 go now. I'm hearing both sides' arguments, if I could figure  
18 out how to phrase these questions in a way without unreasonably  
19 confusing the jury, and I'll work on it this afternoon.

20 Any comments from plaintiff?

21 MR. DOVEL: Your Honor, that approach is acceptable.  
22 In response to your suggestion that the Court would have to  
23 rule on a motion if we were going to add a witness, I will let  
24 the other side know we are going to look into it, and we will  
25 keep them apprised as soon as we can figure out what can be



1 done and then we will bring the motion.

2 THE COURT: Sure. My general approach of late  
3 additions of witnesses or documents or things like that, I  
4 basically make you ask for it. Then I turn to the other side,  
5 "Well, do you have an objection? If so, what's your  
6 prejudice?" Then I look at really is there any unfair  
7 prejudice.

8 Okay. What's defendant's view on this sort of hybrid  
9 approach to a verdict form as I just described?

10 MR. O'NEAL: As I'm thinking, Judge, I think it is a  
11 good compromise. I would like to let the gerbil run in the  
12 wheel a little bit to think about it more, but I think we are  
13 on the right track.

14 THE COURT: Mr. Franzini?

15 MR. FRANZINI: One suggestion, Your Honor, I guess  
16 the standard is, have we proven by a preponderance of the  
17 evidence? One idea would be to say ask the question for both  
18 and then say: Of those, how many did plaintiff prove by a  
19 preponderance are mobile and how many of those are landlines?

20 THE COURT: I might put it: Has the plaintiff proven  
21 by a preponderance of the evidence a specific number of mobile?  
22 Yes or no? If yes, what's the number? Has the plaintiff  
23 proven by a preponderance of the evidence how many were  
24 residential? Yes or no? If yes, what's the number?

25 MR. FRANZINI: I think how many would work. I think

1 a specific number is a very specific phrasing.

2 THE COURT: All right. Well, then I would say: Has  
3 the plaintiff proven by a preponderance of the evidence -- what  
4 should be the end of that question?

5 MR. FRANZINI: What I would say: Of those calls, in  
6 response to question 4, how many has plaintiff proven by a  
7 preponderance of the evidence are mobile phones or cellular  
8 phones?

9 THE COURT: I still want to find out from the jury,  
10 though, if they believe they can't tell. You will have my  
11 assessment at some point after the evidence has closed whether  
12 the evidence is sufficient to justify a verdict. But I want to  
13 find out from the jury do they believe they have enough  
14 evidence to tell. So what do we ask them?

15 Do you have enough evidence to make a determination?  
16 I would want to give them the option of either putting in a  
17 number that they believe the plaintiff's evidence can prove by  
18 a preponderance, or saying, "We can't tell."

19 MR. FRANZINI: Two ideas, Your Honor. One would  
20 be -- I think the question itself -- if the jury concludes that  
21 we haven't proven any by a preponderance, then the answer would  
22 be zero. But if Your Honor wants to include a specific kind of  
23 "don't know" box, I think that would be fine too.

24 THE COURT: Okay. I'll work on something, and then  
25 you can all talk about it. My plan is to email it to you this

1 afternoon. You can send me email responses either today or  
2 tomorrow. Tomorrow is Tuesday.

3 On Wednesday, all we are going to do is pick a jury  
4 and hopefully give them preliminary instructions so we can talk  
5 further on Wednesday. Then you will do your opening statements  
6 on Thursday morning and call your witnesses on Thursday. So  
7 there is enough time to try to work this out.

8 I think that takes me through my agenda.

9 Is there anything else that any of you would like to  
10 discuss at our pretrial conference?

11 MR. JACOBSON: Your Honor, plaintiff has two new  
12 exhibits that we would like to address now and get at least a  
13 tentative ruling on, if we can, and then two exhibits that we  
14 addressed previously that Your Honor either had some further  
15 requests on or that Your Honor stated that you would like to  
16 consider it further. I would like to briefly address those  
17 again.

18 THE COURT: All right. Do I have copies of these  
19 exhibits?

20 MR. JACOBSON: You do. The first exhibits we are  
21 going to address are P6 and P7.

22 THE COURT: One moment. I have in my notebook P6 and  
23 P7. I'm not sure what you mean by "new."

24 MR. JACOBSON: We didn't address them at the last  
25 pretrial conference.

1 THE COURT: Understood. Got it.

2 Give me one moment.

3 MR. JACOBSON: Of course, Your Honor.

4 THE COURT: Okay. Ready.

5 MR. JACOBSON: What P6 and P7 are emails and written  
6 communications between the class representative, Ms. Wakefield,  
7 and her husband, who also briefly signed up as a ViSalus  
8 promoter and ViSalus. What's in here is Ms. Wakefield  
9 requesting that ViSalus cancel out her account. It is a series  
10 of communications that culminate on this email, which is P7-8,  
11 where ViSalus gives her written confirmation that she no longer  
12 has a business relationship with ViSalus.

13 As we have been discussing today and as ViSalus has  
14 repeatedly asserted, one issue in this trial is what  
15 relationship these class members had with ViSalus, and the  
16 relevance is to prove, by the time that ViSalus called  
17 Ms. Wakefield, she had no relationship with them. In fact, she  
18 had written confirmation of this. It is not hearsay because  
19 this is a communication written by ViSalus to Ms. Wakefield.  
20 It is offered against ViSalus. It is an admission by a  
21 party-opponent.

22 THE COURT: All right. There are a number of pages  
23 here on P6 and P7.

24 Let me hear from defendant, any particular portions  
25 of this that I should look at right now that are particularly

1 objectionable in your view?

2 MR. O'NEAL: Yes. So a couple of things, Judge. The  
3 relevant facts that the plaintiff had ended her role as a  
4 promoter, and I'm looking for it now. If I'm not mistaken,  
5 Judge, that's actually in the stipulation. So to try to put in  
6 evidence about the point that it was ended in 2013 is  
7 duplicative.

8 The second piece is, if we are just talking about  
9 ending it, maybe that's okay. But the real issue is, if you  
10 look at 6 and the remainder of it, there is all kinds of an  
11 email exchange where either Mr. or Mrs. Wakefield is very upset  
12 with my client because they think that they were charged  
13 incorrectly, or that they had previously told them not to send  
14 them any product. It is that type of stuff, Judge, that is  
15 prejudicial, and it is not relevant.

16 So if the whole point is that we want to make sure  
17 that the jury knows that the promotership between my client and  
18 the plaintiff was ended back in 2013, I don't think that's  
19 controversial. I think, like I said, it is in the stip. But  
20 we don't need to put in this "ViSalus sucks because you charged  
21 me money that I shouldn't be charged."

22 THE COURT: Exhibit 6, is this an email that reads  
23 chronologically from back to front? Is that how it reads?

24 MR. JACOBSON: Let me examine it, Your Honor.

25 THE COURT: Or front to back.

1 MR. JACOBSON: Exhibit 6 appears to read  
2 chronologically from front to back.

3 THE COURT: Although I see in the middle of page 6-1,  
4 an email from 6:52, and then an earlier email is right below  
5 it, an email from 6:45 p.m. Do you see that?

6 MR. JACOBSON: I do, Your Honor.

7 THE COURT: All right. Let me just read the whole  
8 thing.

9 (Pause.)

10 THE COURT: I assume that Byron Wakefield is  
11 plaintiff's husband?

12 MR. JACOBSON: Correct, Your Honor. Ms. Wakefield  
13 also used that email address for herself as well.

14 THE COURT: All right. Let me turn to defendant. I  
15 have now read the entirety of P6. We will turn to P7 in a few  
16 moments. I don't see anything in here that says "ViSalus  
17 sucks" or words to that effect. Where is it?

18 MR. O'NEAL: Judge, I may have been getting this one  
19 mixed up with 7.

20 THE COURT: Okay.

21 MR. O'NEAL: But in this one, the one that caught my  
22 attention when I was flipping through. "Byron Wakefield:  
23 Please cancel anything we have with this company I requested  
24 months ago in the back office, and I would like my \$25 refund  
25 that was charged to my account."

1 THE COURT: That doesn't rise to the level of  
2 "ViSalus sucks." That's an overstatement. I would anticipate  
3 admitting Exhibit 6.

4 MR. O'NEAL: Understood, Judge.

5 THE COURT: Assuming we have Ms. Wakefield give a  
6 foundation that this was given to her or received from ViSalus.

7 All right. Let me read 7.

8 (Pause.)

9 THE COURT: All right. Let me ask plaintiff's  
10 counsel, I have read all of 7. What does Exhibit 7 add that's  
11 relevant to this case that you don't get with Exhibit 6 when I  
12 receive Exhibit 6?

13 MR. JACOBSON: Your Honor, I believe Exhibit 7 is the  
14 interactions for ViSalus for Ms. Wakefield's account. Even  
15 though it is the same email account, Exhibit 6 is for her  
16 husband, Byron Wakefield.

17 THE COURT: Let me call your attention to the first  
18 page of Exhibit 7 at 7-1. "Hi, my name is Lori Wakefield, and  
19 we have the Vi Net Pro 39.99. Me and my husband, Byron, my  
20 husband, both two different accounts we didn't sign up for. I  
21 canceled it within two weeks, and I just saw it there again.  
22 We have both been billed for it and a startup fee, and I want  
23 my money back."

24 Is that relevant to this case?

25 MR. JACOBSON: It is, Your Honor.

1 THE COURT: How?

2 MR. JACOBSON: And I'll explain how. Ms. Wakefield  
3 will testify that she first canceled her account with ViSalus  
4 in the spring of 2011. The way she did that is she went on  
5 their website to a portal they called a back office, and she  
6 clicked "cancel." They didn't cancel her out. They kept  
7 shipping her stuff. So she had a series of these email  
8 interactions with them that finally in 2013, almost a year  
9 later, resulted in her getting written confirmation from them  
10 that "we canceled."

11 These emails show both that she got her written  
12 confirmation, and we need all of them, because if we just show  
13 the written confirmation in 2013, the jury is not going to  
14 understand why it took a year for that to happen. ViSalus  
15 hasn't pointed out anything inflammatory that is going to  
16 inflame the jury in here, and we are not going to dwell on the  
17 shipping problem. We just need to show why it took a year to  
18 cancel.

19 THE COURT: I'm speaking to defendant now: I don't  
20 see anything in here that says "ViSalus sucks" or words to that  
21 effect. Am I missing it?

22 MR. O'NEAL: No. If I may respond --

23 THE COURT: You may.

24 MR. O'NEAL: -- to this point.

25 I don't understand what the relevance is between the



1 time of saying that I want to cancel and the ultimate  
2 cancellation of the promotership. The telephone calls that are  
3 at issue, Judge, didn't take place within that time period.  
4 The telephone calls which are at issue occurred two years later  
5 in April of 2015.

6 We did stipulate that Plaintiff Wakefield briefly  
7 signed up to be a ViSalus promoter in February of 2012.  
8 Plaintiff Wakefield subsequently ended her affiliation with the  
9 company.

10 So I hear what counsel said. They sure would like to  
11 get into the jury and say, "Look, ViSalus took a year to cancel  
12 the account," but I don't know why that's relevant to issues of  
13 whether or not violative calls were made two years later.

14 THE COURT: Response by plaintiff.

15 MR. JACOBSON: Your Honor, the timing is relevant,  
16 because as we discussed, it is relevant what relationship these  
17 promoters had with ViSalus. ViSalus didn't call Ms. Wakefield  
18 a day after she canceled. They didn't call her a year after.  
19 It was three years since she had anything to do with them.  
20 This is relevant to showing that, and there is nothing  
21 inflammatory here that would substantially outweigh that  
22 relevance.

23 THE COURT: All right. I would expect to allow in  
24 Exhibit 7 also as a business record of ViSalus and non-hearsay  
25 by Ms. Wakefield because it shows the context for the response.

1 So I would expect to allow in both 6 and 7.

2 That's not what this case is really going to be  
3 about. There is going to be plenty of reasons why jurors don't  
4 like telemarketers who make robo call. Another statement like  
5 this is not going to make a difference.

6 Anything else anybody wants to talk about?

7 MR. FRANZINI: May I be heard on one more exhibit,  
8 Your Honor?

9 THE COURT: Of course.

10 MR. FRANZINI: I have got a couple of slides here.  
11 The exhibit is Exhibit P34A. This is the manual that describes  
12 the operation of the POM machine that was used to place the  
13 calls. 34A is an excerpt of that manual that was shown to  
14 Mr. Gidley at his deposition. He authenticated it at his  
15 deposition. He said, "It's the POM user manual. This appears  
16 to be the user manual. It is an excerpt of what you considered  
17 to be the user manual."

18 First of all, it is not a document created by  
19 ViSalus, but it is a document that ViSalus had and used to  
20 understand how the POM system worked. So it is a business  
21 record of ViSalus in that sense. There is also some hearsay  
22 exceptions I can go into, to the extent Your Honor is concerned  
23 about that.

24 THE COURT: What's the objection from defendant?

25 MR. O'NEAL: Judge, this is something that ties into

1 what I'm waiting to hear what the plaintiffs say. It is  
2 correct. This is the manual for Progressive Outreach Manager.  
3 It is correct that Mr. Gidley testified in that way. It is  
4 correct in Chapter 12 there is a listing of completion codes,  
5 which discuss how certain calls were disposed of.

6 If you look at the summary that the plaintiff has  
7 prepared, it has got an excess of 1 million calls, which they  
8 have identified as not having disposition codes on them. I  
9 don't know whether they are going to be contending whether  
10 those are violative calls or not, and there is nothing in this  
11 manual that talks about what happens on a call that has no  
12 disposition code.

13 So if plaintiff is going to say, "My case is limited  
14 only to those calls for which there is a disposition code,"  
15 then I'm backing up pretty good. But on the other hand, if  
16 they say, "Oh, no. It is a hybrid. I've got some other  
17 stuff," then I need to see how it is going to unfold.

18 THE COURT: You are raising interesting questions. I  
19 assume that these are the sort of questions that you would want  
20 answered, whether in discovery or motion practice. My question  
21 to you is, what's objectionable about Exhibit 34A?

22 MR. O'NEAL: Looking at Mr. Gidley's testimony,  
23 Judge, I don't believe he had sufficient foundation to  
24 authorize it. He said it looked like a manual -- to  
25 authenticate it, he said it "appeared to be a manual."

1 THE COURT: As an officer of the court, can you tell  
2 me that this is not the manual?

3 MR. O'NEAL: I cannot.

4 THE COURT: Okay. By the way, since it is only  
5 excerpts, if you want to introduce other excerpts or other  
6 portions of the manual, I'll allow you to do that. If you want  
7 that done, just give the plaintiff a copy, and maybe we will  
8 mark it 34B or something, if they've selectively excerpted from  
9 the manual.

10 MR. O'NEAL: Actually, Judge, if I could do this: I  
11 think they have marked the whole manual as Exhibit 34. This  
12 section is marked 34A.

13 THE COURT: Got it.

14 MR. O'NEAL: So while I'm giving Your Honor some  
15 thoughts, what I would like to do is just say let's move in 34  
16 and not make a 34A.

17 THE COURT: No. When you have a really big, thick  
18 manual, it is not fair to the jury to make them look through a  
19 100-page manual. But if you want the jury to look at certain  
20 pages they haven't marked in 34A, you're welcome to do it  
21 either by showing it to the jury obviously in 34 or marking  
22 something as 34B. So that way, we will tell the jury, "34 is a  
23 big, thick manual" -- and by the way, you are going to offer  
24 the full 34, right?

25 MR. FRANZINI: We are offering 34A, Your Honor.

1 THE COURT: All right. Well, if the defendant  
2 chooses to offer the full 34, I assume plaintiff does not  
3 object, correct?

4 MR. FRANZINI: I haven't looked through the whole  
5 thing, Your Honor. I'm currently not aware of any objections.  
6 If they point to a particular part that's objectionable for  
7 some reason --

8 THE COURT: I just don't want there to be a big,  
9 thick manual, and you get to cherrypick the portions you want  
10 from it, but they don't get to point out other aspects of it.  
11 If you want to introduce 34A, I'm going to let you do that. If  
12 there are other pieces of it that defendant wants to also  
13 introduce that's also in the manual, I'm going to give the  
14 defendant the option of either introducing other portions that  
15 weren't part of 34A. They could call it 34B, or they can  
16 introduce the whole 34, and tell the jury, "Well, the plaintiff  
17 only give you certain cherrypicked portions of it. Here is the  
18 rest of the manual. Now take a look at this one page they  
19 didn't give you."

20 I want fairness. That's how we are going to do it.  
21 That said, now, if you want to offer 34, I'll receive it, and  
22 then you can offer 34A, even though it is a little bit  
23 cumulative. It is going to be easier for the jury. I'll let  
24 you decide what to do.

25 MR. FRANZINI: Thank you, Your Honor.

1 THE COURT: Anything else we should talk about?

2 MR. JACOBSON: Your Honor, I have an additional  
3 relevance basis for P45. This was one of the customer  
4 complaint emails that Your Honor reserved ruling on.

5 THE COURT: One moment. P45?

6 MR. JACOBSON: Yes, Your Honor.

7 THE COURT: The Canadian?

8 MR. JACOBSON: The Canadian, Your Honor.

9 Bree Schappert. Your Honor, the previous relevance of this  
10 email, as we discussed, this shows that the WinBack campaign in  
11 the POM system was delivering prerecorded messages, which is a  
12 disputed issue. That's relevant --

13 THE COURT: To the people in Canada?

14 MR. JACOBSON: That's correct. And that's relevant  
15 regardless because that's how the POM system worked for people  
16 in the U.S. too.

17 We have an additional basis for relevance,  
18 Your Honor, that certainly gets this over the 403 hurdle. I've  
19 put on the board what Mr. Gidley, ViSalus's business analyst,  
20 said when he was confronted with this email. What he said was  
21 this was a promoter who was actually terminated for a violation  
22 of policies and procedures. I'm not sure which one -- most  
23 likely promoting another MLM -- who had subscribed to a daily  
24 text message service.

25 Then it goes on to say that the reason she was

1 getting all of these cases was because we were not aware that  
2 "we used a separate service." That appears to be a lie,  
3 Your Honor. When you look at this Bree Schappert email, it is  
4 not about text messages. She doesn't mention text messages.  
5 It is about recorded phone calls. This is relevant to the  
6 credibility of ViSalus's compliance analyst, Mr. Gidley, who,  
7 when confronted with this, instead of saying the truth, "Oh,  
8 this looks like someone who was getting recorded calls," he  
9 tried to suggest this was some kind of separate system that  
10 wasn't the POM system. There is no unfair prejudice that  
11 substantially outweighs that relevance. Credibility is  
12 paramount, Your Honor.

13 THE COURT: Defendant's response.

14 MR. O'NEAL: I think we are talking about text  
15 messages here, Judge. I come back to -- she then subscribed to  
16 a daily text message service. "Why did it take so many  
17 attempts for her to get removed from the contact list? At that  
18 time we were not aware that we used a separate service."

19 I don't know what that means. It seems like  
20 Mr. Gidley is testifying about text. Then I come right back to  
21 the issue of what happened to somebody in Canada. It can't be  
22 relevant. They can't even be a member of the class.

23 THE COURT: I think we are going too far afield. It  
24 is not clear to me how this relates to Mr. Gidley's  
25 credibility. I am especially concerned since Mr. Gidley is not

1 a live witness here, so he can't explain how it is or is not  
2 relevant.

3 MR. JACOBSON: Your Honor, Mr. Gidley is on the  
4 ViSalus's witness list as a "may call."

5 THE COURT: All right. Then here is what we will do:  
6 I don't anticipate letting this in during plaintiff's  
7 case-in-chief. If Mr. Gidley testifies live for defendant,  
8 then it will be much more significant that you be entitled to  
9 explore his credibility.

10 However, remember that you can't attack credibility  
11 with extrinsic evidence. So we will explore that when we are  
12 talking with Mr. Gidley live. For right now I'm going to say  
13 ruling is reserved. I'll see how things develop.

14 MR. JACOBSON: Understood, Your Honor.

15 THE COURT: Anything else we should talk about?

16 MR. JACOBSON: Yes, Your Honor. On Exhibit P47, we  
17 addressed this at the last pretrial conference, and Your Honor  
18 suggested some redactions to this.

19 THE COURT: Uh-huh.

20 MR. JACOBSON: This is the Better Business Bureau  
21 complaint by a class member.

22 THE COURT: Right.

23 MR. JACOBSON: Your Honor suggested that we redact  
24 reference to the complaint or to the "DNC" or "Do Not Call"  
25 list. We proposed some redactions to ViSalus. They would not



1 agree on them. They proposed some counter-redactions. They  
2 would not agree.

3 So let me propose to Your Honor our latest proposal  
4 about how we handled this. I've shown this to the other side.  
5 What I have here, Your Honor, I have taken this exhibit, and I  
6 have highlighted what I think we should keep in. If it is  
7 highlighted, then I suggest we keep it. I have also created a  
8 clean-up copy, that if we do the redactions this way, it will  
9 show Your Honor what the jury would see.

10 May I approach?

11 THE COURT: Please do.

12 MR. JACOBSON: When Your Honor is ready, I can  
13 explain the rationale for these.

14 THE COURT: I'm ready.

15 MR. JACOBSON: Your Honor, there are three parts.  
16 The first part is this woman made a complaint to the Better  
17 Business Bureau. That's the part that Your Honor wanted  
18 redacted.

19 The second part is what happened after that, which is  
20 that Mr. Gidley, ViSalus's compliance analyst, looked into it  
21 and confirmed that two messages were left on her voice mail as  
22 part of the WinBack campaign. That's the part that's relevant.

23 And then the third part is ViSalus's response to the  
24 Better Business Bureau complaint, when they said, "Put her on  
25 our 'Do Not Call' list," and they told the Better Business

1 Bureau that she had been removed.

2           You can't just redact the Better Business Bureau  
3 complaint and leave the response, because then it appears to  
4 the jury that ViSalus is just being super diligent, when in  
5 reality they only did this because there were two complaints to  
6 the Better Business Bureau.

7           So what I suggest we do is redact it down to the part  
8 that's relevant, which is there was a phone call. We looked  
9 into it. Two voice mails were left on the machine as part of a  
10 WinBack campaign. That's it. The jury doesn't know it was a  
11 complaint. The jury doesn't know what ViSalus did in response  
12 to that complaint. They just know what Mr. Gidley found out  
13 about these messages.

14           THE COURT: All right. What's the defendant's  
15 objection?

16           MR. O'NEAL: Two or three points, Judge. One, if you  
17 note, there is no reference in here that the messages that are  
18 being referred to are in fact recorded.

19           Then, second, that's really the hook. Unfortunately,  
20 the underlying complaint wasn't attached to the version that  
21 the plaintiff has shown you. But what the underlying complaint  
22 was, Judge, included a reference by the person that she had  
23 been recorded. What the real complaint about the recorded part  
24 is, is the part that we wanted to put in, any incoming phone  
25 calls are informed by recording; that the call may be recorded

1 for quality assurance purposes.

2 THE COURT: Is the part you wanted to put in in the  
3 original 47?

4 MR. O'NEAL: Yes, Judge, it was.

5 THE COURT: Okay. It sounds like the easiest thing  
6 to do is to go back to the original and let in all of 47.

7 MR. JACOBSON: That works for us, Your Honor.

8 MR. O'NEAL: That's fine, Judge.

9 THE COURT: Okay. Mary, will you give this back to  
10 them.

11 At the risk of getting a positive response, anything  
12 further we should talk about?

13 MR. DOVEL: Your Honor, we have -- in response to the  
14 objections to the Exhibit 36, that was the summary of call  
15 outcomes. We created a revised Exhibit 36A, which we provided  
16 to defense counsel.

17 Your Honor has reserved ruling on this until trial.  
18 I don't think there is anything to be done on it now unless  
19 defendants want to talk about it further. If you would like,  
20 Your Honor, I can provide you right now with a paper copy of  
21 the 36A.

22 THE COURT: Yes, please.

23 MR. DOVEL: For the record I'm providing His Honor a  
24 black-and-white version and a color version. The color version  
25 is a little hard to read.

1           THE COURT: All right. So my plan still on 36A,  
2           which is being offered as a summary of voluminous records, does  
3           the defendant know now whether or not they will have any  
4           objection to this as a summary?

5           MR. O'NEAL: I fully expect we will, but I just got  
6           it yesterday, Judge, and I haven't scrubbed it.

7           THE COURT: I think what we will need to do is wait  
8           and hear the foundation at trial. I assume the plaintiff will  
9           offer it. If the defendant wants to ask questions in aid of an  
10          objection, I'll allow that. If you don't have questions and  
11          you want to make your argument, we will do that. That, we will  
12          probably take out of the presence of the jury, and then we will  
13          see if an adequate foundation has been a laid under 1006.

14          MR. O'NEAL: One item I would like to preserve for  
15          the record, Judge, the summary or the data that they are  
16          summarizing is 4 million horizontal lines with five vertical  
17          columns, which is 20 million data points to be summarized.  
18          Apparently they are using some sort of very powerful computer  
19          to create this, which we don't have.

20          I'm two or three days away from trial with the new  
21          summary that seems to have some new information, which I  
22          haven't been able to vet. So as part of my objections, Judge,  
23          I'm certainly going to argue timeliness and prejudice.

24          THE COURT: Understood. What I don't understand, and  
25          I'm speaking and thinking out loud, with a summary of something

1 this voluminous, why it wasn't a request for admission back  
2 when discovery was open, that's where I normally see a request  
3 for admission to the other side to admit this is an accurate  
4 summary. Then things get fleshed out probably by a joint  
5 interrogatory. If it is not an accurate summary, what's  
6 inaccurate about it? Then if the defendant objects too much or  
7 the respondent objects too much, then there is a motion to the  
8 Court to either deem it admitted or to make them respond. All  
9 this gets sorted out back in the middle of discovery.

10 Why that wasn't done here, I'm not going to waste my  
11 time speculating.

12 MR. O'NEAL: One point, Judge. I don't think this  
13 summary -- and I can give you the exact dates -- I don't think  
14 this summary was presented except as part of the pretrial  
15 process where the parties were exchanging exhibits.

16 THE COURT: I understand what you are saying.

17 MR. O'NEAL: Thank you, Judge.

18 THE COURT: I just don't understand why those types  
19 of issues weren't battened down back during discovery. I'm not  
20 asking for any explanation.

21 Anything else we should discuss right now?

22 MR. FRANZINI: One more quick thing. There are a  
23 couple of exhibits that are business records of ViSalus that  
24 Your Honor reserved rulings on.

25 THE COURT: Part of it now, I want to see some

1 foundation of the business records. Present them with a  
2 witness, offer them, and I'll hear if there is an objection.  
3 If it is a business record, it is going to come in, assuming it  
4 is relevant.

5 MR. FRANZINI: That's fine then, Your Honor.

6 Thank you.

7 THE COURT: Okay. All right. Anything else?

8 MR. O'NEAL: Yes. Just to reconfirm, same thing,  
9 unless it is admitted, no reference to an exhibit in opening  
10 statement? Correct, Judge? We can still say, "The evidence is  
11 going to show" --

12 THE COURT: I don't think anything has been admitted  
13 right now.

14 MR. O'NEAL: Right.

15 THE COURT: But both sides are welcome to tell the  
16 jury what they believe the evidence will show. By the way,  
17 speaking of which, will either side be using some type of  
18 demonstrative exhibit besides just their spoken words during  
19 opening statement?

20 MR. JACOBSON: I intend to have a few slides,  
21 Your Honor.

22 THE COURT: What about defendant?

23 MR. O'NEAL: I'm a simple man, Judge. I'll probably  
24 have some old boards.

25 THE COURT: Let me ask, Mr. Jacobson, will you

1 present to defendant no long later than 5:00 p.m. tomorrow,  
2 Tuesday, the slides you are planning on using in opening. That  
3 way, when we are all together from Wednesday, I will hear from  
4 defendant do they have any objections to it.

5 MR. JACOBSON: Yes, Your Honor.

6 THE COURT: Keep in mind that my general rule on  
7 demonstratives during opening, and even during closing, if you  
8 can say it, you can show it. But if you can't say it, you  
9 can't show it.

10 So given that an opening statement is to summarize  
11 what you believe the evidence will show and not to make  
12 argument, then if you can't say it in opening statement, you  
13 won't be allowed to show it by putting it in a demonstrative.  
14 But if you want to tell me, "In this demonstrative I'm sure I  
15 would be allowed to say it out loud; I just want to put it in a  
16 multimedia context," if you are correct, I'll allow it.

17 MR. JACOBSON: Understood, Your Honor.

18 MR. O'NEAL: Judge, what's your view of saying, "For  
19 example, the judge has just instructed you that the elements of  
20 the claim are A, B" --

21 THE COURT: That's closing argument.

22 MR. O'NEAL: Got it.

23 THE COURT: That, go for it. That's why I instruct  
24 them before your closing argument. I will give you, and if  
25 anybody wants this, you can have it in PDF or Word or whatever

1 you want. You will have my final instructions. You are more  
2 than welcome to take the final instructions and the verdict  
3 form that I will have just shown to the jury before you begin  
4 your closing arguments and show them how the evidence applies  
5 to the law. You are welcome to use my instructions and verdict  
6 form however you wish in closing arguments, with the sole  
7 exception, you can't tell the jury that the jury got the law  
8 wrong. You are stuck with the law. You can't embellish the  
9 law. But by all means, show them the law that I just told them  
10 and then show them how the facts do or do not fit into that  
11 legal framework. That's closing, not opening.

12 MR. O'NEAL: Some administrative stuff, Judge. I  
13 would like to add two impeachment exhibits. It is nothing  
14 controversial. I will disclose what they are. It is the  
15 complaint that was filed by the plaintiff and then the first  
16 amended complaint. So I move that be allowed.

17 Second issue, Judge, the stipulation issue,  
18 Mr. Franzini and I were working on that, and we exchanged a  
19 draft. I think it was filed with Your Honor. But we weren't  
20 entirely clear whether Your Honor intended to both read or  
21 submit written or to do both. I think now it looks like we are  
22 just going to give them a written version.

23 THE COURT: I would just rather give them a written  
24 version.

25 Any objection to that procedure?



1 MR. DOVEL: No objection, Your Honor.

2 MR. O'NEAL: No objection, if that's your ruling. I  
3 will have some revisions, because when I was doing it, I was  
4 expecting that Your Honor was going to read it.

5 THE COURT: So why don't the two sides work together  
6 and then give me something that you both agree is clean and can  
7 be handed to the jury.

8 MR. O'NEAL: Okay. Just to make a clear record, I  
9 think you said this at the last pretrial conference. When it  
10 comes time for both sides to move for judgment as a matter of  
11 law, as I understand the process that Your Honor is putting  
12 into place, once we say that we move for judgment as a matter  
13 of law, having done so, we now have preserved all factual and  
14 legal bases to be argued to Your Honor.

15 THE COURT: Yes and no. I don't want to take up too  
16 much jury time. But what I'm going to do, I'm going to wait  
17 until the end of the case, when all evidence is in, and then  
18 let both sides make their specific arguments to me for judgment  
19 as a matter of law. You don't need to make a two-hour  
20 argument. But if you want to make five points, make your five  
21 points, A, B, C, D, and E. I really do expect to reserve  
22 ruling on that.

23 MR. O'NEAL: I was just thinking about when I move at  
24 the close of the plaintiff's case.

25 THE COURT: I don't think it matters anymore. It

1 used to matter in the olden days. I don't think it matters, if  
2 you don't move at the close of the plaintiff's case, as long as  
3 you move before the matter is submitted to the jury. That's my  
4 understanding.

5 MR. O'NEAL: Old habits die hard, Judge.

6 THE COURT: I know. I will give you the opportunity  
7 to move, before the matter is submitted to the jury, tell me  
8 specifically what your arguments are. Let's say you make five  
9 points, A, B, C, D, and E. I'll probably reserve ruling on it.  
10 Then depending on how things turn out, we will deal with it in  
11 post-trial motions. But I would not plan on you then thinking  
12 of a new argument post-trial, Argument F, and being allowed to  
13 make that as part of a renewed motion as a matter of law.

14 MR. O'NEAL: Understood.

15 Judge, on scheduling, I think your most recent said  
16 that we are going to be here on Monday.

17 THE COURT: Here is the thing: I'm going to tell the  
18 jury that we may be done with this trial by Friday; otherwise,  
19 it may go into Monday, just in case a juror has purchased plane  
20 tickets on Sunday. I'm moderately hopeful we can get this case  
21 to the jury on Friday.

22 Do you think I'm wrong?

23 MR. O'NEAL: No, Judge. I think both sides are going  
24 to be pretty darn judicious with the limited time we have. I'm  
25 scheduling it so this thing is done at 5:00 on Friday. That's

1 when closings will be finished.

2 THE COURT: Well, if the closings are finished at  
3 5:00 on Friday, when will the jury deliberate?

4 MR. O'NEAL: I don't know.

5 THE COURT: Yes, you do. The answer is Monday. They  
6 are not going to be deliberating Friday night, and they are not  
7 going to be deliberating on Saturday or Sunday. I was  
8 moderately hopeful closings would be Friday morning. Is that  
9 totally unrealistic?

10 MR. O'NEAL: I don't think so, Judge.

11 THE COURT: Let's see if we can try to get all the  
12 evidence in on Thursday. Then you do your closings Thursday  
13 morning. My instructions -- by the way, it typically takes  
14 about 30 minutes to read closing instructions. If we start at  
15 nine o'clock or even 8:30 on Friday, I read the instructions to  
16 the jury. We go straight into closing. They have the case.  
17 We might get a decision by Friday.

18 But I am going to have to warn them and find out in  
19 voir dire, if it does go into Monday, is there anybody here  
20 unable to come back.

21 MR. O'NEAL: Last issue, Judge. In the email last  
22 night -- I think you suggested that you might want to give the  
23 plaintiff the opportunity to respond to my designations -- my  
24 objections to designations. I don't know if you want to do  
25 that.

1           THE COURT: I have looked at them all. I'm prepared  
2 to overrule all of them. Would you like to be heard on that  
3 and try to wrestle defeat from the jaws of victory?

4           MR. DOVEL: No, Your Honor.

5           THE COURT: I looked at every one of them.

6           MR. O'NEAL: Thank you.

7           THE COURT: Thank you.

8           MR. JACOBSON: Your Honor, I apologize. A few  
9 logistical items that the paralegals asked me to ask you about.  
10           First, jury notebooks. One thing we suggest to  
11 include in those are the stipulations --

12           THE COURT: What else would it be? We will have  
13 stipulations for every juror.

14           MR. JACOBSON: Anything else Your Honor wants us to  
15 include in those notebooks?

16           THE COURT: You don't need to give them notebooks.  
17 Here is what they are going to get: They are not going to get  
18 my preliminary instructions in writing. Feel free, when both  
19 sides agree, to bring enough copies of the stipulations for all  
20 our actual jurors, eight copies and one for me, please, and one  
21 for my law clerk.

22           Then we will pass out to them, right before I do  
23 final instructions, the final written instructions and verdict  
24 form. What else are they going to need? I don't think  
25 anything else.

1 MR. JACOBSON: Sounds good.

2 THE COURT: Anything else from the paralegals?

3 MR. JACOBSON: Your Honor, giving exhibits back to  
4 the jury, Your Honor knows we have that collection of  
5 spreadsheets that are native. One suggestion, we have a laptop  
6 that is scrubbed of anything except those exhibits. So after  
7 they come into evidence, we could send that back with the jury,  
8 and if they wanted to actually open up spreadsheets and look at  
9 them, they could. I don't know how else to get them the  
10 spreadsheets in a way they could use them.

11 THE COURT: Mary, they probably won't fit on our JERS  
12 system, correct?

13 THE CLERK: I don't think so.

14 THE COURT: Any objection to that?

15 MR. O'NEAL: No, Judge.

16 MR. JACOBSON: We checked.

17 THE COURT: All right. That will be fine.

18 MR. JACOBSON: Lastly, Your Honor, and we can discuss  
19 this later if it makes sense. For closing argument, we would  
20 like to use a projector screen in the well with the jury.

21 THE COURT: Mary can show you what our options are,  
22 but I'll give you my two cents, and then you can do anything  
23 you want.

24 You have seen the display monitors in the jury box,  
25 right?

1 MR. JACOBSON: Yes.

2 THE COURT: Anything we put up there, they can see  
3 there.

4 We also have the ability -- Mary, would you lower the  
5 screen. We have the ability to set up a projector in the well  
6 and a display on that screen. Now in my opinion, unless you  
7 are showing a photograph -- if you're showing a document, it is  
8 better for them to see it on their screens in the jury box.  
9 But if you want to use a projector from the well and project it  
10 on that screen, you're welcome to. But I don't think that's a  
11 good idea for anything other than photographs, and you don't  
12 have photographs. I think if you want to show them documents,  
13 the better thing to do is to set it up through the court system  
14 so it displays on their monitors.

15 MR. JACOBSON: Understood. We also have our own  
16 screen that can be set up freestanding in the well. Is that  
17 something we could potentially use?

18 THE COURT: Well, the problem with that is I want to  
19 see it too. I want to see it on my monitor. If it is hooked  
20 up so I can see it on my monitor, I guess that's fine. If we  
21 use that screen, then everybody in the courtroom can see it.  
22 If you put up your own screen, where Mr. Franzini is right now,  
23 then defense counsel can't see it. They are blocked from  
24 seeing the jury's reaction to various things.

25 I think the best way to do it, and that's why the

1 building was built with a screen up there, is so everybody can  
2 see what everybody is looking at and nobody's view of the jury  
3 is obstructed. That said, those screens work beautifully for  
4 videotaped depositions, for photographs, and they work  
5 miserably for documents.

6 MR. JACOBSON: Understood, Your Honor.

7 THE COURT: But they are really good for videotaped  
8 depositions.

9 MR. O'NEAL: One last question, and I can move it if  
10 Your Honor is inclined to. This goes back to the summary.  
11 Laying the foundation and doing a voir dire on that, I think,  
12 is going to be pretty lengthy, and let me give you a couple of  
13 heads-up. For example, at last running count, the voir dire  
14 has in excess of 30,000 --

15 THE COURT: You say "voir dire." When you say  
16 "voir dire," I think of my discussion/our discussion with the  
17 jurors.

18 MR. O'NEAL: I'm sorry, Judge. The classic expert --  
19 do you mind if I ask the expert some questions before you allow  
20 it?

21 THE COURT: All right. So basically your  
22 foundational questions for this summary witness.

23 MR. O'NEAL: Yes, Judge.

24 THE COURT: Got it.

25 MR. O'NEAL: And some of them don't go to foundation.

1 Some of them go to whether the summary is appropriate in the  
2 first place. For example, we have been doing some running  
3 numbers, and there are a lot of fake numbers in there. There  
4 is a lot of 1-800 numbers. There looks to me in excess of  
5 30,000 Canadian telephone numbers, which don't qualify under  
6 the TCPA. There are a lot of issues.

7           Going through that, Judge, is going to take a lot of  
8 time that I'm not sure we want to do in front of the jury. So  
9 Mr. Foster and I were batting around, is this something we want  
10 to do in a preliminary hearing with Your Honor? Is this  
11 something we want to do in front of the jury? I recognize  
12 these issues we are talking about, Judge, they also go to cross  
13 and us demonstrating the problems associated with the exhibit  
14 and the testimony, but at the same time some of them are bases  
15 where you might say that this thing is unreliable and it can't  
16 come in.

17           THE COURT: Plaintiff's position.

18           MR. DOVEL: Your Honor, this is the first time  
19 they've raised an issue with the presence of Canadian numbers  
20 or fake numbers. So I'm glad they've raised that. We will  
21 look at this. If we can identify those, we will take them out  
22 of that. We are willing to deal with any objection they have,  
23 but they haven't told us what their objections are. This is a  
24 brand-new one, and we will take care of it. If they have  
25 another objection, we will take care of that. I think they are



1 trying to sandbag us, Your Honor. I wish they would tell us  
2 what their objections are.

3 MR. O'NEAL: Judge, I gave them my objections, but  
4 I'm certainly not going to script out my cross for them.

5 THE COURT: Let me give some thought to it. We will  
6 talk about it some more.

7 MR. O'NEAL: Thank you, Judge.

8 THE COURT: Thanks. I am going to send you the final  
9 on the order on pretrial motions and objections probably within  
10 an hour or so. I have got a sentencing this afternoon, but I  
11 will try to get you something by email on the verdict form also  
12 by the end of today.

13 (Recess.)

14 MR. DOVEL: Thank you, Your Honor.

15 MR. FOSTER: Thank you, Your Honor.

16 THE COURT:

17 (Recess.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca  
DENNIS W. APODACA, RDR, RMR, FCRR, CRR  
Official Court Reporter

April 26, 2019  
DATE

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